UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

November 19, 1997

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
vs.	)	
	)	OCAHO Case No. 97B00101
IBP, INC., Respondent.	)	

ORDER

PROCEDURAL HISTORY

On August 5, 1997 I issued a memorandum of prehearing conference and scheduling order setting forth the schedule for further proceedings in this case pursuant to discussions had at the telephonic prehearing conference. The schedule called for the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) to file its motion for summary decision within thirty days and for IBP to initiate its discovery requests within sixty days, that is, thirty days after the motion for summary decision.

OSC's motion for summary decision was actually filed on September 29, 1997 and was followed by IBP's motion to strike with alternative action requested. IBP requests in the alternative that if its motion to strike is denied it be granted an extension of time to respond to the motion for summary decision until 60 days "from the full receipt of answers to its discovery requests, including the taking of the deposition of Claudia Allen." INS filed its memorandum in opposition to respondent's motion together with its own motion to stay further discovery pending ruling on the motion for summary decision. For the reasons herein set forth, the motion to strike is denied, the motion for extension of time is granted in part and denied in part, and the motion to stay discovery is taken under advisement pending IBP's response to the motion for summary decision. To the extent that OCAHO rules[1] do not expressly address the specific issues posed by these motions, I have referred to the decisions of the federal district courts under the Federal Rules of Civil Procedure as a general guideline in accordance with 28 C.F.R. § 68.1.

The Motion to Strike

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1996).

IBP's motion to strike is premised upon two grounds, first, the fact that INS' motion for summary decision was not filed within the thirty-day period agreed to at the prehearing conference and that the motion should therefore be stricken, and second, that the affidavit of its former employee Claudia Allen filed with the motion "shows that the Complainant, without the Respondent's knowledge, authority, or proper notice, breached the attorney/client privilege with this former employee of IBP, Inc." and that the affidavit should accordingly be stricken from the record as well.

First, the short delay in filing the motion for summary decision is insufficient under the circumstances to justify striking it. No prejudice has been asserted or shown as a result of the delayed filing. The time frames set out in the scheduling order were based upon agreed undertakings by the parties rather than being imposed as cut-off dates, and I am accordingly disinclined to impose draconian remedies for failure to adhere to them rigidly.

Second, notwithstanding conclusory allegations as to what the Allen affidavit shows, it is not self evident from the affidavit that this former employee was ever the recipient of any specific information or documents subject to the attorney-client privilege or, if so, whether such documents or information were disclosed to the complainant. The fact that a former employee may know or reveal facts damaging to the employer has nothing to do with whether disclosure of those facts implicates the attorney-client privilege. That privilege extends only to communications, not to facts. Upjohn Co. v. United States, 449 U.S. 383, 395 (1981). If respondent can produce evidence that Claudia Allen was privy to confidential communications with its counsel and that such privileged communications were divulged in the course of the ex parte contact, a protective order may be sought and the exclusion of privileged matter may be appropriate. See Valassis v. Samuelson, 143 F.R.D. 118, 125 (E.D. Mich. 1992), Polycast Tech. Corp. v. Uniroyal, Inc., 129 F.R.D. 621, 629 (S.D.N.Y. 1990), DuBois v. Gradco Sys., Inc., 136 F.R.D. 341, 346 (D. Conn. 1990). The affidavit itself, however, shows no such thing.

The majority of courts addressing the question have held that attorneys may have ex parte contact with former employees of a corporate defendant without notice to or approval by the former employer. United States v. Beiersdorf-Jobst, Inc., F. Supp. ____, 1997 WL 640799, at *2 (N.D. Ohio 1997), Orlowski v. Dominick's Finer Foods, Inc., 937 F. Supp. 723, 728 (N.D. Ill. 1996), Brown v. St. Joseph County, 148 F.R.D. 246, 253 (N.D. Ind. 1993), Cram v. Lamson & Sessions Co., 148 F.R.D. 259, 266 (S.D. Iowa 1993). As was observed by the court in Aiken v. Business and Industry Health Group, Inc., 885 F. Supp. 1474, 1477 (D. Kan. 1995):

> In March of 1991, the American Bar Association Committee on Ethics and Professional Responsibility issued a formal opinion stating explicitly that Rule 4.2 does not extend to former employees, even managerial employees or those whose conduct might be the basis for imputing liability to the employer or whose former statement could be admitted in
>
> evidence as an admission by the employer under Federal Rule of Evidence

801(d)(2). ABA Comm. On Ethics and Professional Responsibility, Formal Op. 91-359, at 6 (March 22, 1991).

In the face of such a broad green light to opposing counsel's contacts with former employees it cannot be concluded simply because the affiant is a former employee that there was any improper disclosure. Absent some showing that the affiant was even in possession of any privileged information, much less disclosed it, the motion to strike the affidavit must be denied.

The Motion For Extension of Time

The motion of IBP for an indefinite extension of time until sixty days after "full" completion of all its discovery is denied. Such an extension would end only when IBP unilaterally decided that it should. This would effectively mean that neither the complainant nor the judge would even know when the time period was over.

A non-moving party's burden in responding to a motion for summary decision, moreover, does not require the production of all the evidence the non-moving party would present at a hearing. All that is required is some minimal showing that there actually is a genuine issue of material fact remaining for hearing. If there is some specific item of evidence which IBP needs in order to make that showing, it must affirmatively demonstrate first, why it is now unable to respond to the movant's evidence and second, how a postponement of a ruling on the motion to permit specific discovery will enable it to rebut the moving party's showing. See Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982) (discovery obtainable under Rule 56(f) to oppose a motion for summary judgment would normally be less extensive in scope than the general discovery obtainable under Rule 26), Pasternak v. Lear Petroleum Exploration, Inc., 790 F.2d 828, 832 (10th Cir. 1986) (party opposing summary judgment and seeking continuance must file an affidavit explaining the need for additional discovery), Korf v. Ball State Univ., 726 F.2d 1222, 1230 (7th Cir. 1984) (Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious).

IBP shall have fifteen days in which to respond to the motion for summary decision. If it is unable to do so, it may file an affidavit explaining why it is unable to respond. If the reason relates to incomplete discovery, the explanation must set forth the basis for the belief that specified facts exist and are susceptible of collection within a time certain, and how such facts would influence the outcome of the motion. Resolution Trust Corp. v. North Bridge Assocs., Inc., 22 F.3d 1198, 1203 (1st Cir. 1994). A claim that future discovery may yield unspecified facts will not be sufficient to successfully oppose the motion.

The Motion to Stay Discovery

The basis for OSC's motion to stay discovery appears to be that OSC has already produced much if not all the discoverable material. If that is the case there is no reason to anticipate that IBP will make extensive additional discovery requests. OSC's real objection appears to be the request of IBP to depose Claudia Allen, the former employee whose affidavit is offered in support of the motion for summary decision. The motion to stay discovery will be taken under advisement pending IBP's response to the summary decision motion. There is simply no way I can discern from the filings before me what issues the deposition would be designed to address and whether they relate to issues of attorney-client privilege or to the issues presented by the motion. IBP should have the opportunity to spell out the relationship between the motion and any proposed discovery.

If IBP has discovery requests designed to generate evidence pertinent to the issues posed by the motion for summary decision, these requests must be allowed. See, e.g., Wichita Falls Office Assocs. v. Banc One Corp., 978 F.2d 915, 920 (5th Cir. 1992), cert. denied, 508 U.S. 910 (1993) (when party seeks discovery germane to pending summary judgment motion it is inequitable to pull out the rug from under them (sic) by denying such discovery). Summary judgment is wholly improper where the nonmoving party has not had the opportunity to obtain evidence of the facts it needs to oppose the motion. Cf. Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986), Farmer v. Brennan, 81 F.3d 1444, 1449 (7th Cir. 1996). The nonmoving party has the burden of showing how the additional discovery proposed relates to the issues posed by the motion for summary decision. King v. Dogan, 31 F.3d 344, 346 (5th Cir. 1994), citing International Shortstop, Inc. v. Rally's, Inc., 939 F.2d 1257, 1266-67 (5th Cir. 1991), cert. denied, 502 U.S. 1059 (1992).

CONCLUSION

IBP's motion to strike is denied. OSC's motion to stay discovery is taken under advisement. IBP's motion for extension of time is granted in part in that IBP is granted fifteen days to respond to the motion for summary decision or to set forth by affidavit a showing of what discovery is needed and how that proposed discovery relates to the issues raised by the motion.

SO ORDERED.

Dated and entered this 19th day of November, 1997.

_____

Ellen K. Thomas
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of November, 1997, I have served copies of the foregoing Order on the following individuals at the addresses indicated:

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